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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

## BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

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Of Counsel:
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THOS. J. COLE.

Petition for certiorari filed February 6, 1939.
granted March 13, 1939.

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SCOTT COUNTY MILLING COMPANY, a Corporation.

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## BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

### COMMENTS ON THE DISCUSSION BY RESPONDENT ON THE QUESTION OF JURISDICTION.

Respondent, commencing at page 1 of its supplemental brief, discusses the question of the jurisdiction of this Court and makes the point that the decision of the Supreme Court of Missouri was based in part on nonfederal questions broad enough to maintain the judgment.

And at page 7 of such supplemental brief the following statement is made:

> "The state court decision rested not alone on the question of the payments being voluntary, but the decision rested on the further question as to whether or not under the circumstances as shown by the record in this case it would be inequitable to require the respondent to repay the money it had received."

An examination of the decision of the Supreme Court of Missouri establishes the fact that every conclusion reached by that Court was based on a finding that payment of the award of damages by petitioners was voluntary. In order to reach the conclusion that such payment was voluntary the Missouri Court was compelled to construe, and did construe, Section 16 of the Interstate Commerce Act (Title 49, U. S. C. A.) (R. 103, 104). The lower court stated (R. 109):

> "The effect of the carrier's act in **voluntarily** paying the award under the circumstances shown, was to treat the matter as a closed transaction, and cause respondent to believe that the litigation was ended." (Emphasis supplied.)

In fact, it clearly appears from the decision of the Supreme Court of Missouri that that Court was of the opinion that the action of the carrier in (as found by that Court) voluntarily paying the award induced respondent to change its position so that it could not be placed in statu quo.

The question whether such payment was voluntary or involuntary (if material to this proceeding) is for this Court to decide; but we make the point that the Missouri Court did not, either directly or by inference, hold that without regard to whether the payment in question was voluntary or involuntary, it would be inequitable to require the restoration of the money.

Commencing at page 9 of its supplemental brief, respondent, relying on the case of Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510, contends that the record in this case shows that the questions of voluntary payment and estoppel fairly arose out of the record and were not arbitrarily injected into the case. In support of that contention respondent sets out certain portions of its answer in which it pleaded certain facts relied upon to show that the payment was voluntary and that petitioners were estopped to recover the same.

This contention overlooks the fact that from the very beginning to the end of this case there is involved a proper construction of a federal statute and if a construction of that statute is required in order to decide the issues, the doctrine declared in the case last cited is not material.

## COMMENT ON THE CONTENTION OF RESPONDENT THAT PAYMENT WAS VOLUNTARY.

Respondent in its supplemental brief again discusses, at page 12, the question of whether the amount sued for was a voluntary payment, and, while we are convinced that in order to decide the issues it is not necessary to determine whether the payment made was voluntary or involuntary, nevertheless, we submit the following as indicating that such payment was in fact involuntary:

(1) Respondent had secured from the Interstate Commerce Commission an award of damages and an order requiring the carriers to pay such an award within a specified period.

(2) The case had been twice heard by the Interstate Commerce Commission upon an exhaustive record.

(3) Respondent was demanding payment of the award and had decided upon immediate action (R. 89).

(4) Suit by respondent and recovery of the damages in question meant payment by the carriers of attorneys' fees and costs.

(5) In such suit the findings and order of the Commission would be prima facie evidence of the facts therein stated.

(6) In any suit on an award of damages by the Commission the only defenses open to the carriers are (a) that the order is unsupported by testimony, (b) that the shipper has sustained no damage, and (c) that the order of the Commission, if enforced, would result in confiscation.

(7) The carriers could not in a suit by a shipper to collect an award of damages made by the Commission go into the question of the reasonableness or unreasonableness of the rates involved.

(8) It is not urged in this case that the findings and order of the Commission involved were unsupported by testimony, that respondent had in fact sustained no damages, or that the rates ordered in could have been shown to have been confiscatory.

While naming no defense that the carrier could have made, had a suit been instituted to collect the award of damages entered by the Commission, the respondent asserts that, nevertheless, the carrier should have refused to pay and forced respondent to sue.

The Supreme Court of Missouri, while also stating no defense that the carrier could have urged, declares the general doctrine:

> "An order of the Commission which violates the constitutional rights of a carrier, or is based upon a finding without evidence or upon evidence which does not support it, is not conclusive on the courts and cannot stand if properly assailed."

The above doctrine is correct, but nowhere in its opinion does the Missouri Court show how such doctrine could have been applied to the facts of this case (R. 105). It asserts (R. 106) that the federal statute cuts off no defense, interposes no obstacle to a full contestation of all the issues and takes no question of fact from either court or jury, but it neglects to say what defense, if any, the carrier could have successfully urged if suit had been brought upon the award.

The lower court also stated in its opinion (R. 107):

> "The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but on the contrary paid the award in full before filing its motion for rehearing with the Commission."

In the foregoing it is not asserted that any defense that might be available in a given case was available in this instance. In other words, the position of the state court and of the respondent is that notwithstanding the fact the carrier was defenseless, the latter should have permitted suit to have been brought against it and incurred the penalty of the statute or else be charged with having made a voluntary payment.

The state court held also that the payment in question was not made under a mutual mistake of facts (R. 108), and we assume that the effect of its opinion is that the payment was made under a mistake of law. A mistake of law happens when a person having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508. It certainly does not appear that the carrier when it paid the award in question had come to any erro-

neous conclusion as to the legal effect of the facts. Respondent, however, in its answer seems to take that position. The carrier knew the legal effect of the facts as such facts then existed and hence paid the award, while the respondent urges that regardless of whether the carrier could have successfully contested the award in court, it should, nevertheless, have permitted itself to be sued or else the money paid could not be recovered.

Finally analyzed, the holding of the state court and the position of respondent are identical in that they both assert that because as an abstract proposition certain defenses could be made to a suit to enforce an award of damages entered by the Commission when circumstances warranted, without regard to whether the circumstances warranted such action in this case, the carrier should, nevertheless, have awaited a judgment before paying the award, and, not having done so, must be held to have made a voluntary payment with full knowledge of the facts.

## COMMENT ON THE STATEMENT OF RESPONDENT THAT THE PURPOSE OF THE INTERSTATE COMMERCE ACT DOES NOT MAKE NECESSARY RECOVERY BY PETITIONERS.

In discussing the question of whether a recovery by petitioners would be in accord with the purpose of the Interstate Commerce Act, respondent makes the point that the fact that one shipper pursued his remedy and another did not, does not amount to the discrimination, favoritism and inequality sought to be eradicated by the Interstate Commerce Act. It also makes the point that if one shipper brings suit within a year, and another shipper does not, it results in an inequality.

The foregoing argument overlooks the fact that the purpose of the Interstate Commerce Act was to regulate

the conduct of the carrier rather than the shipper and that the discrimination, favoritism and inequality condemned by the act are those practiced or which might be practiced by the carrier. It is one thing for a shipper to neglect to assert his legal rights and another and different thing for a carrier to be placed in a position where, by action on its part, one shipper can be preferred and another discriminated against.

It is undoubtedly the intent of the Interstate Commerce Act that a carrier shall not be in a position where, by forcing one shipper to sue upon an award of reparation while paying another shipper similarly situated upon demand, can enable the latter to keep the money paid him, while the former, because of action taken by the Commission, is denied recovery of any part of the award.

## CONCLUSION.

This suit is brought upon the theory that the money in question having been paid by the carrier obedient to an order of the Interstate Commerce Commission can be recovered, since the order in question has been set aside and a finding entered that the rates involved, when assessed, were not unreasonable, that the respondent had not sustained damages and was not entitled to recover any sum from the carriers.

It is also the position of petitioners that a determination of the question of whether the money paid was paid voluntarily or involuntarily is not necessary to a determination of this case.

Petitioners also contend that since respondent paid rates found reasonable by the Commission when assessed, the same as other shippers similarly situated, and since by reason of the payment of the money sued for, respondent, in addition to having paid reasonable rates the same as

paid by other shippers, has received from the carrier a large sum of money, to permit the respondent to retain such money would be to force the carrier to involuntarily rebate a shipper. In this connection we refer to the recent case of **Lowden v. Simonds-Shields-Lonsdale Grain Co.**, Law. ed. Advance Opinions, Vol. 83, page 610, decided by this Court March 27, 1939, in which the following holding appears:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. **Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.**" (Emphasis supplied.)

In our opinion the rule declared in the case last cited is particularly applicable to the facts of the instant case and that a recovery by petitioners would, as stated by us in our brief in support of petition for writ of certiorari, be in full accord with the purposes of the Interstate Commerce Act.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of Missouri Pacific Railroad Company, a Corporation,
Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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| II. The Supreme Court of Missouri held, in construing said section 16 of the act, that the carrier should have refused to have paid the award entered by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it, and that the payment of the award before filing motion for rehearing with the Commission and without suit having been brought thereon was a voluntary payment and could not be recovered, although such orders of the Commission had thereafter been set aside by that body | 13 |

III. The Supreme Court of Missouri held that payment of the award in question without waiting for suit to be brought thereon was not a payment made under a mistake of fact, but was a payment voluntarily made with a full knowledge of all of the facts and could not be recovered by petitioners, though the award in question had been set aside by the Commission ..... 14

IV. The Supreme Court of Missouri held that since in its opinion the payment of the award in question was voluntary, such payment caused respondent to believe that the matter was a closed transaction and that it would be inequitable to require respondent to refund the amount so paid, even though the Commission had set aside the award of reparation in question and all orders requiring the payment thereof, because the respondent could not now be placed in statu quo ..... 15

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# SUPREME COURT OF THE UNITED STATES.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### JURISDICTION.

Respondent is of the opinion that petitioners' petition and brief do not disclose jurisdiction in this Court to review the judgment of the Supreme Court of Missouri in this case.

It is conceded by respondent that the judgment in this cause by the Supreme Court of Missouri was a judgment by the court of last resort of that state and that timely application for the writ herein was made by petitioners.

The petition herein does not disclose that the decision of the Supreme Court of Missouri was based solely on a federal question, but, on the contrary, we are of the opinion that the petition filed herein and the opinion of the Supreme Court of Missouri show that the decision of the Supreme Court of Missouri rested in part on nonfederal grounds broad enough to support that Court's judgment.

In the suit brought by petitioners in the state court they sought to recover from defendant in an action for money had and received (R. 5-10), and the defendant's answer (R. 11-20), among other defenses, pleaded (1) voluntary payment and (2) payment under circumstances which estopped petitioners from recovering the money so paid, and that under the facts it would be inequitable and unjust to require defendant to repay the money to the petitioners.

The opinion of the Supreme Court of Missouri held (1) that the payment was a voluntary payment, and (2) that the circumstances under which petitioners paid respondent were such as to induce respondent to believe the litigation had terminated and induced it to pay its representative his fee of 50 per cent of the amount recovered, to pay the balance in dividends and use it for corporate purposes, and that since it could not recover back such money because of the Statute of Limitations its condition was so changed that it would be against equity and good conscience to require it to repay the money.

Cases denying the jurisdiction of this Court:

Arkansas Southern Railroad Company v. German National Bank, 207 U. S. 270, 28 S. Ct. 78, 52 L. Ed. 201;

Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644;

Municipal Securities Corporation v. Kansas City, 246 U. S. 63, 38 S. Ct. 224, 62 L. Ed. 579.

## STATEMENT OF CASE.

The respondent submits the following as supplementing petitioners' summary statement of the matter involved:

After the order of the Commission for the payment of reparation, a representative of the respondent called on Mr. Perkins, vice-president of the Missouri Pacific Railroad Company, and asked Mr. Perkins about the payment of the reparation. Mr. Perkins then inquired what the Frisco Railroad had done about it, and when informed that Mr. Kurn, the president of the Frisco Lines, had ordered the reparation paid, replied, "Well, whatever the Frisco has done, the Missouri Pacific will do likewise" (R. 88).

The payments were then made between April 4th and 19th (R. 26), and immediately thereafter 50 per cent of the amount received by respondent was paid to its traffic expert under contract of employment (R. 28, 29, 91).

The form of petitioners' action in the Scott County, Missouri, Circuit Court was one for money had and received (R. 6), and in their petition alleged:

> "* * * and because and on account of said Interstate Commerce Commission of the United States having jurisdiction of said cause and legal authority to make such reparation award and to enforce the same, and because said Missouri Pacific Railroad Company had no appeal therefrom, said Missouri Pacific Railroad Company, having no alternative, was required to and did pay to said defendant" (R. 9).

The case was tried upon an agreed statement of facts and depositions offered (R. 87-91), resulting in a judgment for respondent, and upon appeal the Supreme Court of Missouri affirmed the judgment of the lower court and by its opinion filed held that restitution would not be decreed under the facts in this case and held: